



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

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Pursuant to petition filed June 8, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) one year, a hearing was held on Monday, July 20, 2015 at 01:15 PM at Eau Claire, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

Michael O'Brien  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The respondent (CARES [REDACTED]) is a resident of Illinois who received FoodShare benefits in Dane County from December 14, 2010, through May 31, 2011.
2. The petitioner received FoodShare under both her name and [REDACTED] name from December 14, 2010, through May 31, 2011. This allowed her to receive \$2,061.40 more in FoodShare than she was entitled to during this period.

3. On June 15, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that received FoodShare under two different names.
4. The respondent failed to appear for the scheduled July 20, 2015, Intentional Program Violation (IPV) hearing and did not provide any good cause for her failure to appear.

### DISCUSSION

FoodShare recipients commit an intentional program violation if they intentionally make a fraudulent statement about their identity to receive multiple benefits at once. A FoodShare recipient loses her eligibility for the program for 10 years if the department proves by clear and convincing evidence that she intentionally violated this rule. 7 CFR §§ 273.16(b)(5). The Department seeks to disqualify the respondent for that period because it contends that she fraudulently used the identity of a former neighbor in Indiana to receive FoodShare under both her former neighbor's name and her own name at the same time. This allowed her to receive \$2,061.40 in benefits that she was not entitled to from December 14, 2010, through May 31, 2011.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn v. Kuehn*, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The *McCormick* treatise suggests that the standard “could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program's rules, the evidence must induce a firm conviction that she falsely asserted she was Lisa Gately in order to receive FoodShare under two names at the same time and that she did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of his voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The agency presented evidence that the respondent received benefits under both her own and [REDACTED] name. This evidence included a deferred prosecution agreement the petitioner signed admitting that she committed this particular violation. Because the burden of proof in a criminal case is beyond a reasonable, a higher standard than in this disqualification matter, it alone is sufficient proof that she committed the alleged offense. She did not appear at the hearing to dispute any of the allegations. Based upon this, I find that agency has established by clear and convincing evidence that she committed an intentional program violation and correctly seeks to disqualify her from the FoodShare program for 10 years.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FoodShare program rule specifying that she not make fraudulent statements to receive benefits under two names at once.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE,** it is

**ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify her from the program for 10 years, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

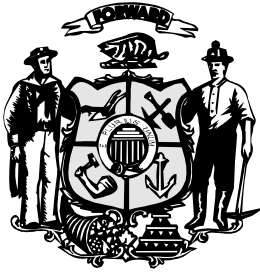
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 21st day of July, 2015

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\sMichael O'Brien  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
Sherrie Johnson - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on July 21, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[sherrie.johnson@dhs.wisconsin.gov](mailto:sherrie.johnson@dhs.wisconsin.gov)